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No. 07-529

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Supreme Court of the United States

RANDOLPH GEORGE,

Petitioner,

v.

UNITED STATES OF AMERICA.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR PETITIONER

Faced with a clear split among the circuits, the government attempts to avoid this Court's review by casting the question presented in this Petition as a narrow, transitional issue. Opp. at 13. To the contrary, the Petition raises the broader and substantial question of the contours of the substantive reasonableness standard of review articulated in *United States v. Booker*, 543 U.S. 220 (2005), and discussed in recent Court decisions.

The government concedes that the Ninth Circuit's decision below deepened a circuit split on the question of what standard the appellate courts should apply when reviewing the reasonableness of sentences re-imposed after *Booker*, acknowledging that "the courts of appeals have taken different approaches to reviewing unpreserved claims of *Booker* error." Opp. at 12. This circuit split concerns the Court's holding in *Booker* that a substantive reasonableness standard was to be applied to all sentences imposed in cases that were pending on direct review at the time *Booker* was decided. 543 U.S. at 268. A majority of the circuit courts that have considered the issue has held that such reasonableness review requires that, if a district court elects on post-*Booker* remand to adhere to the originally imposed sentence, the appellate court will review the sentence for substantive reasonableness—the same substantive reasonableness standard to be applied in all *Booker* cases.

In contrast, the Ninth Circuit's opinion below, applying its decision in *United States v. Combs*, 470 F.3d 1294 (9th Cir. 2006), held that in certain cir-

cumstances its review is limited to "[w]hether the district judge properly understood the full scope of [her] discretion in a post-*Booker* world." *Id.* at 1297, *quoted in United States v. George*, 420 F.3d 991, 1001-02 (9th Cir. 2006). Neither *Booker* nor a majority of circuit courts contemplates this anemic standard of appellate review, which denies defendants the right to have a court of appeals review the substantive reasonableness and thus the constitutionality of their sentences.

This Petition presents the opportunity for the Court to clarify the meaning of substantive reasonableness review under *Booker* and to harmonize the circuit split acknowledged by the government. Despite the government's attempt to cast the decision below as isolated and transitional, the question presented in this Petition is one of national and pressing importance, and warrants review.

THE STANDARD OF REVIEW FOR *BOOKER* ERROR IS OF SIGNIFICANT AND NOT DIMINISHING IMPORTANCE.

A. The Courts Of Appeals Have Taken Conflicting Approaches To Substantive Reasonableness Review.

As even the government concedes, Opp. at 12, the Ninth Circuit's decision below conflicts with the majority of the circuits to have considered the scope of reasonableness review for sentences re-imposed post-*Booker*. *See United States v. Williams*, 475 F.3d 468 (2d Cir. 2007) (applying full substantive reasonableness review and singling out the Ninth Circuit for being out of step with the majority). Contrary to the government's attempt to narrow the dispute to in-

consequential proportions, whether the *Booker* claim is preserved or unpreserved, the question dividing the circuits is undeniably important: what does the substantive reasonableness standard articulated in *Booker* require a court to consider on appellate review? *See United States v. Paladino*, 401 F.3d 471, 484 (7th Cir.), cert. denied, 546 U.S. 849 (2005) ("[T]he mere reimposition of the original sentence does not insulate it from appellate review under the new [*Booker*] standard.").

As the Petition shows, the Ninth Circuit has answered that fundamental question in a radically different manner than other circuits. Under the current circuit split, criminal defendants in certain circuits are afforded substantially different appellate rights—varying from a robust reasonableness review of the substance of the sentence to no substantive review at all. *Compare Paladino*, 401 F.3d at 484 (applying the substantive reasonableness review applicable to all *Booker* cases), *with George*, 420 F.3d at 1001-02 (reviewing only to ascertain whether the sentencing court understood the scope of its discretion after *Booker*). Such a high degree of variance among the circuits is particularly troubling when it occurs with respect to an issue as fundamental as the Sixth Amendment. The issue underlying this circuit split warrants review.

B. The Ninth Circuit's Refusal To Apply Serious Substantive Reasonableness Review Conflicts With This Court's Recent Decisions.

The government appears to rest its argument against certiorari on the fact that this case arose in the context of plain-error review. *See* Opp. at 10-11. Review for plain error, however, is an "ordinary pru-

dential doctrine" that frames, rather than supplants, the substantive reasonableness review required to ensure that federal sentencing decisions comply with the Sixth Amendment. *See Booker*, 543 U.S. at 268 (holding that substantive reasonableness is the standard of appellate review to be applied to all cases pending on direct review at the time *Booker* was decided, while also noting that "ordinary prudential doctrines" such as the plain-error test remain applicable). As the Second and Seventh Circuits have held, the plain-error test will insulate certain sentences from reversal "*provided that the sentence is reasonable, the standard of appellate review prescribed by Booker.*" *Paladino*, 401 F.3d at 484 (emphasis added); *Williams*, 475 F.3d at 474 ("We hold here that we review a sentence for reasonableness even after a District Court declines to resentence pursuant to [post-*Booker* remand].") The Ninth Circuit's abdication of its duty to apply substantive reasonableness review, as this Court directed in *Booker*, is inconsistent with *Booker* itself.

In addition, the Ninth Circuit's interpretation of reasonableness review is inconsistent with the description of such review contained in recent cases. While it is true, as the government notes, that *Booker* does not explain how courts should apply plain-error analysis to post-*Booker* sentencing claims, Opp. at 11, the Court has suggested the contours of the substantive reasonableness review to be applied prospectively as well as to all cases pending on direct review at the time *Booker* was decided. All of these cases appear to call for a more robust substantive reasonableness review than that applied by the Ninth Circuit. *See Gall v. United States*, 128 S. Ct. 586, 597 (2007) (explaining that the appellate

court must review a sentencing decision for substantive reasonableness, taking into account the "totality of the circumstances"); *Kimbrough v. United States*, 128 S. Ct. 558, 576 (2007) (noting that the "ultimate question" was whether Kimbrough's sentence was reasonable, that is, whether the district court abused its discretion in determining the length of Kimbrough's sentence); *Rita v. United States*, 127 S. Ct. 2456, 2463-64 (2007) (finding that, while appellate courts may apply a presumption of reasonableness to district court sentences that are within the properly calculated sentencing range, this presumption was not binding and appellate courts should continue to determine the reasonableness of the sentence). The substantive reasonableness review applied by the Second and Seventh Circuits accords with this Court's description in *Booker* and its progeny. The truncated review provided by the Ninth Circuit in this case does not.

There is no reason to be found in this Court's case law why the robust reasonableness review articulated in the Court's post-*Booker* decisions should not apply in plain-error cases. By looking only to whether the district court understood the full scope of its post-*Booker* discretion, the Ninth Circuit has abandoned any meaningful reasonableness review. The plain-error context does not excuse appellate courts from applying the substantive reasonableness review required by this Court to ensure compliance with the Sixth Amendment.

C. The Question Presented Is Not Limited To "Transitional" Concerns.

The government attempts to smooth over the circuit split and the inconsistencies between the deci-

sion below and recent Court precedent by characterizing this Petition as raising merely "transitional" concerns. Opp. at 10. This attempt fails for several reasons.

As a threshold matter, the question presented affects *at the very least* all *Booker* claims reviewed for plain error. This will not necessarily be a small class of cases. As Justice Scalia noted in his concurring opinions in both *Gall* and *Rita*, the Court's conclusion that the Federal Sentencing Guidelines were purely advisory does not in all cases protect against sentences based on additional judge-found facts. Because "the Court has not foreclosed as-applied constitutional challenges to sentences....[t]he door remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury." *Gall*, 128 S. Ct at 602-603 (Scalia, J., concurring). It is inevitable that some of these as-applied constitutional claims will not be perfectly preserved for appeal. Accordingly, the intersection of plain-error analysis and the substantive-reasonableness standard of review articulated in *Booker* will continue to divide the federal courts of appeal beyond the initial period of transition from a mandatory to advisory Guideline system. The appellate standard of review for unpreserved sentencing claims remains a live and pressing issue.

In addition, while certiorari would be warranted even if the question related solely to unpreserved claims of *Booker* error, the facts of this case illustrate that the Petition does not concern purely unpreserved error: Mr. George challenged the

reasonableness of his sentence in the first instance (although not, of course, in terms of *Booker*, which had not yet been decided). Moreover, even if the Ninth Circuit had correctly viewed Mr. George's sentencing claims as unpreserved, there is no support for the Ninth Circuit's decision that different standards of substantive review apply to defendants who challenge the reasonableness of their sentences on direct appeal and those who did not. *See Combs*, 470 F.3d at 1299 (Berzon, J., dissenting) (noting that the *Combs* majority drew an unauthorized distinction between those who questioned the reasonableness of their sentences on appeal, and those, like Combs, who did not).

Finally, this Petition presents an issue of great importance because review here would allow the Court to clarify the contours of the reasonableness review *Booker* set forth as the governing standard. As recently noted, because the Court did not precisely define reasonableness review, the standard is open to varying interpretations. *Gall*, 128 S. Ct. at 603-04 (Alito, J., dissenting) ("The *Booker* remedial opinion did not explain exactly what it meant by a system of 'advisory guidelines' or by 'reasonableness' review, and the opinion is open to different interpretations."). The Ninth Circuit's decision below, and the circuit split it fostered, illustrate how this confusion over reasonableness review has resulted in divergent approaches to appellate review that negatively reflect on the fairness and uniformity of federal sentencing.

* * *

Contrary to the government's assertions, the question of what standard of review is to be applied

to claims of *Booker* error affects all sentencing cases, not just transitional ones, and thus is of great and lasting importance. The confusion over how *Booker*'s substantive reasonableness review is to be applied has resulted in conflicting approaches to sentencing review that will continue if the Court does not provide clarification. As evidenced by the Court's willingness to clarify other post-*Booker* points of law and procedure, *see, e.g.*, *Gall*, 128 S. Ct. at 597, *Rita*, 127 S. Ct. at 2463-64, the standards to be applied both to the initial surge of *Booker* claims and the normal flow of cases to come are sufficiently important to warrant review. Certiorari is warranted in this case because the Ninth Circuit's decision below not only conflicts with the majority of federal circuit courts that have considered the question presented, but is also out of step with this Court's post-*Booker* decisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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